U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0108 BLA

LINDA WATERS (o/b/o GARY E. WATERS) Claimant-Petitioner v. FLORENCE MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/23/2020 DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification Denying Benefits (2017-BLA-06240) of Administrative Law Judge Drew A. Swank rendered on a claim filed

[1] Claimant is the widow of the miner, who died on July 8, 2017. Director's Exhibit 43. Claimant is pursuing the miner's claim on his behalf and did not file a survivor's claim.

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of the miner's claim filed on November 14, 2013.

In his initial decision, dated October 3, 2016, the administrative law judge found the miner did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] because the miner did not establish he had at least fifteen years of qualifying coal mine employment. Turning to whether the miner established entitlement without the benefit of the Section 411(c)(4) presumption, the administrative law judge found the miner had legal pneumoconiosis but not clinical pneumoconiosis and was totally disabled. 20 C.F.R. §§718.202, 718.204. The administrative law judge further found the miner's disability was not due to his legal pneumoconiosis. 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits. Director's Exhibit 39.

On April 20, 2017, the miner timely requested modification. Director's Exhibit 40. The district director referred the case to the Office of Administrative Law Judges for a hearing, which was held on August 6, 2018.

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge must reconsider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Modification of a claim should not be granted automatically upon finding that a mistake was made in an earlier determination, but only when the administrative law judge concludes that doing so will render justice under the Act. 20 C.F.R. §725.310(a); *see Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968). The administrative law judge has broad discretion in determining whether to grant modification. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002).

Director's Exhibit 44.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis at the time of his death where the evidence establishes at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

After finding justice would be served by granting claimant's modification request, the administrative law judge again credited the miner with 14.30 years of underground coal mine employment and therefore found claimant did not invoke the Section 411(c)(4) presumption. Decision and Order on Modification Denying Benefits at 5-6. Considering the claim without the benefit of the Section 411(c)(4) presumption, the administrative law judge found the miner had clinical pneumoconiosis arising out of coal mine employment;[3] he also reconsidered and reversed his previous finding that the miner had legal pneumoconiosis.[4] Decision and Order on Modification Denying Benefits at 19-20; 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that, although the miner was totally disabled at the time of his death, he was not totally disabled due to his clinical pneumoconiosis. Decision and Order on Modification Denying Benefits at 27, 29; 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends the administrative law judge erred in finding the miner worked for less than fifteen years in qualifying coal mine employment and did not invoke the Section 411(c)(4) presumption. Claimant also contends the administrative law judge erred in finding the miner did not have legal pneumoconiosis. She asserts he erred in addressing and reversing his prior finding and, if properly addressed, he erred in mischaracterizing and discrediting Dr. Cohen's opinion. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), filed a response brief.[5]

[3] On modification, the administrative law judge found clinical pneumoconiosis based on claimant's newly submitted interpretation of Dr. DePonte's December 5, 2016 CT scan. Claimant's Exhibit 1.

[4] On modification, the administrative law judge found no legal pneumoconiosis after rejecting all four medical opinions – those of Drs. Cohen and Rasmussen diagnosing the disease, and those of Drs. Basheda and Rosenberg excluding such a diagnosis. In his initial decision, he had credited the opinions of Drs. Cohen, Rasmussen, and Basheda in finding legal pneumoconiosis established; Dr. Rosenberg's opinion was not considered at that time, as it was first submitted on modification. Director's Exhibits 9, 12, 13, 14; Employer's Exhibit 1.

[5] We affirm, as unchallenged on appeal, the administrative law judge's characterization of the miner's coal mine employment as underground and his findings that the miner had clinical pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment but was not totally disabled due to clinical

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Modification Denying Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Length of Coal Mine Employment

Because the miner had a totally disabling respiratory impairment at the time of his death, Decision and Order on Modification Denying Benefits at 27, the Section 411(c)(4) presumption applies if he had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of establishing the number of years the miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985). The Board will uphold an administrative law judge's determination on the length of the miner's coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge found the miner had 14.30 years of underground coal mine employment. Specifically, he stated:

> Claimant alleged 18 years of coal mine employment. DX-2. On his CM-911a form, he listed 26 years of coal mine employment, all of which [were] underground. DX-3. The [district director] found 14.30 years of coal mine employment. DX-19, DX-28. At [the miner's] first hearing, he testified that he had approximately 18 years of underground coal mine employment. DX-36 at 10. No testimony was offered at the hearing on August 16, 2018. Based upon the totality of the evidence, the undersigned finds 14.30 years of underground coal mine employment, an amount under the statutorily-relevant 15 years. DX-2, DX-3, DX-4, DX-19, DX-28.

pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Decision and Order on Modification Denying Benefits at 5-6. This determination is substantially similar to his 2016 finding of 14.30 years of coal mine employment based "upon the totality of the evidence[.]" Director's Exhibit 39 at 4. Claimant argues that the administrative law judge failed to explain how he arrived at 14.30 years of underground coal mine employment, "seem[ing] to accept the [district director's] finding with no further explanation." Claimant's Brief at 4-5. We agree.

The record contains conflicting evidence, in the form of documentary and testimonial evidence, as to how long the miner worked in coal mine employment. For example, the record contains the claim form, the employment history form, and the Description of Coal Mine Employment form. The miner alleged twenty years, twenty-six years, and eighteen years of coal mine employment in those documents, respectively. Director's Exhibits 2-4. Additionally, the record contains Social Security Administration documents and the miner's testimony that must be considered in determining his length of coal mine employment. Director's Exhibits 6, 36. Rather than addressing and weighing the relevant evidence, the administrative law judge appears to have adopted the district director's finding without discussion or explanation.[7]

Because the administrative law judge did not explain his method of calculating the length of the miner's coal mine employment, and it appears he merely adopted the district director's finding of 14.30 years, we cannot affirm his finding. *See Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we vacate the administrative law judge's finding of 14.30 years of coal mine employment and remand this case to him for reconsideration of the length of the miner's coal mine employment. On remand, the administrative law judge must determine the length of the miner's qualifying coal mine employment, based on any reasonable method of calculation and considering all relevant evidence.[8] *Osborne*, 25 BLR at 1-205; *see Muncy*, 25 BLR at

[7] In both the proposed award and the attachment to the Schedule for the Submission of Additional Evidence, and based on the Social Security Administration earnings records and employer's statement attesting to the miner's last day of work, the district director credited the miner with coal mine employment from October 1, 1969 to November 6, 1985. He found, however, without explanation, the miner had 14.30 years of coal mine employment. Director's Exhibits 5, 19, 28.

[8] The administrative law judge must first determine whether the evidence establishes the beginning and ending dates of the miner's coal mine employment and may determine the dates and length of coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *Osborne v. Eagle Coal Co.*, 25 BLR

1-27. He must fully explain his findings, as the Administrative Procedure Act requires.[9] *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge finds the miner had at least fifteen years of qualifying coal mine employment, claimant has invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).[10] If the presumption is invoked, the administrative law judge must determine whether employer has rebutted the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[11] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Entitlement under 20 C.F.R. Part 718

Legal Pneumoconiosis

In the interest of judicial economy and in the event the administrative law judge finds on remand that the miner had less than fifteen years of underground coal mine

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1-195, 1-204-05 (2016). Where the beginning and ending dates of the miner's employment cannot be determined, the administrative law judge may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). A copy of the BLS table must be made a part of the record if the administrative law judge uses this method to establish the length of the miner's coal mine employment. *Id.*; *Osborne*, 25 BLR at 1-204 n.12.

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] The parties' stipulation as to total disability was accepted by the administrative law judge; consequently, claimant would be entitled to the benefit of the presumption if the claimant is found to have fifteen years of qualifying coal mine employment.

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

employment, we will address claimant's contention that the administrative law judge erred in finding the miner did not have legal pneumoconiosis. In order to establish entitlement to benefits under 20 C.F.R. Part 718, a claimant must prove the miner had pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he had a totally disabling respiratory or pulmonary impairment, and his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). To establish legal pneumoconiosis, a claimant must prove the miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

On modification, the administrative law judge reconsidered the medical opinions of Drs. Basheda, Cohen, and Rasmussen, along with the newly-submitted opinion of Dr. Rosenberg. Drs. Cohen and Rasmussen diagnosed the miner with legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. Director's Exhibits 9 (Dr. Rasmussen's narrative report at 3-4); 12 at 3; Claimant's Exhibit 3 at 7-10. Drs. Basheda and Rosenberg did not diagnose the miner with legal pneumoconiosis, but instead diagnosed COPD due solely to smoking. Director's Exhibit 14 (Dr. Basheda's report at 19-22); Employer's Exhibit 1 at 3-11. The administrative law judge discredited these medical opinions and concluded the miner did not have legal pneumoconiosis.

Claimant contends the administrative law judge erred in reconsidering the issue of whether the miner had legal pneumoconiosis, as he had found legal pneumoconiosis established in his previous decision, and no new credible evidence was submitted on that issue on modification. Claimant's Brief at 5-7; *see* n.3, *supra*. We disagree. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *O'Keeffe*, 404 U.S. at 256; *see Keating, OWCP*, 71 F.3d at 1123. Moreover, when a party files a request for modification, an administrative law judge has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256. Thus, the administrative law judge acted within his discretion in considering whether the previously submitted evidence of record, together with the newly submitted evidence, established the existence of legal pneumoconiosis, despite previously finding legal pneumoconiosis established. *See* 20 C.F.R. §725.310(c); *O'Keeffe*, 404 U.S. at 256; *Keating*, 71 F.3d at 1123.

Alternatively, claimant asserts that, if the administrative law judge properly addressed legal pneumoconiosis on modification, he erred in rejecting Dr. Cohen's opinion as evidence of legal pneumoconiosis by misinterpreting it. Claimant's Brief at 7-9. We agree with claimant.

The administrative law judge summarized and gave less weight to Dr. Cohen's opinion, which attributed the miner's COPD to both coal mine dust exposure and smoking, because the physician "was unable to differentiate between coal mine dust and cigarette smoking as etiologies . . . ." Decision and Order on Modification Denying Benefits at 18; Claimant's Exhibit 5. The administrative law judge also gave less weight to Dr. Cohen's opinion because the physician related coal mine dust exposure to a diffusion impairment and emphysema, but did not adequately explain how they relate to the miner in this case. *Id*.

Dr. Cohen's opinion reveals he attributed the miner's COPD and emphysema to both the miner's eighteen years of coal mine employment and thirty-six pack-year smoking history. Claimant's Exhibit 3 at 7. He based his conclusion on the miner's moderate reduction in diffusing capacity, medical studies relating coal mine dust exposure to a diffusion impairment, the fact that the miner had emphysema on x-ray, and studies showing that coal mine dust exposure is a cause of emphysema. *Id*. at 8-9. Dr. Cohen acknowledged that pulmonary function testing cannot identify the cause of COPD,[12] and stated, instead, such a determination must be based on the miner's coal mine dust exposure, smoking history, and medical and scientific authorities. *Id*. at 9-10. Having considered the evidence, Dr. Cohen unambiguously concluded the miner's coal mine dust exposure "was significantly contributory" to his COPD and emphysema. *Id*. at 10.

Determining whether a medical report is documented and reasoned is a task for the administrative law judge. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). However, in this case, the administrative law judge erred in stating that Dr.

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[12] Dr. Cohen stated:

> Pulmonary function studies cannot distinguish between obstructive lung disease caused by coal mine dust and that caused by smoking. There is no specific physiologic pattern that will allow you to determine the toxic exposure which caused COPD, whether it is grain dust, coal mine dust, tobacco smoke, or some other occupational or environmental exposure. [citation omitted]. Lung function testing can only show the presence, nature and extent of lung disease.

Claimant's Exhibit 3 at 9-10.

Cohen did not address his analysis to this miner and in according Dr. Cohen's opinion less weight because he "was unable to differentiate between coal mine dust and cigarette smoking as etiologies . . . ." Decision and Order on Modification Denying Benefits at 18. Dr. Cohen specifically related the miner's COPD to the miner's coal mine dust exposure based on the evidence he reviewed. After reviewing Dr. Cohen's medical opinion, we cannot affirm the administrative law judge's characterization of it, as his misinterpretation resulted in giving it less weight. Furthermore, we agree with claimant that the administrative law judge has not adequately explained how Dr. Cohen's inability to apportion between coal mine dust and cigarette smoking as etiologies of the miner's obstructive lung disease renders his opinion entitled to less weight. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); Claimant's Brief at 8. We therefore vacate the administrative law judge's finding that the miner did not have legal pneumoconiosis, and we remand the case for reconsideration of Dr. Cohen's opinion on the issue of legal pneumoconiosis.[13]

Disability Causation

To establish disability causation, a claimant must establish that the miner's pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.[14] 20 C.F.R. §718.204(c)(1). Having found the miner did not have legal pneumoconiosis, the administrative law judge did not address whether legal pneumoconiosis was a substantially contributing cause of the miner's total disability. Decision and Order on Modification Denying Benefits at 27-29. Because we remand this case for reconsideration of Dr. Cohen's opinion on the existence of legal pneumoconiosis, if reached we likewise remand it for consideration of the evidence relevant to disability causation. 20 C.F.R. §§718.202(a), 718.204(c).

[13] In doing so, we make no judgment as to the adequacy of Dr. Cohen's explanation.

[14] Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

In sum, we vacate the administrative law judge's finding that the miner worked in coal mine employment for 14.30 years and remand this case to him for reconsideration of the length of coal mine employment. On remand, if the administrative law judge finds the miner worked in qualifying coal mine employment for at least fifteen years, claimant will have invoked the Section 411(c)(4) presumption. If claimant invokes this presumption, the administrative law judge must then determine whether employer rebutted it. If, however, he finds the miner did not have at least fifteen years of coal mine employment, the administrative law judge must reconsider whether the miner had legal pneumoconiosis, and if so, whether it was a substantially contributing cause of his total disability.[15] We affirm the administrative law judge's decision in all other respects.

[15] If the administrative law judge finds claimant has established entitlement to benefits on remand, he must address whether he is granting modification based on a change in conditions or a mistake in a determination of fact, and therefore determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge